Therefore these two cases were decided on the wrong grounds. See note to *Finch* v. *Gregg,* supra, in 50 L. R. A. 679.

On the second theory advanced by the plaintiff to sustain its claim to a right of recovery, the court holds that the fact that the word "cotton" appears printed in the draft does not contain reference to the bills of lading attached thereto, so as to make plaintiffs' acceptance of the former conditional upon the genuineness of the latter, but that this word was evidently used for the purpose of advertising or characterizing the business in which the drawers were engaged. The conclusion of the court on this point is also correct. The Negotiable Instruments Act provides that an order is unconditional, though coupled with a statement of the transaction which gave rise to the instrument. BUNKER'S, NEG. INSTR., § 5. Hence under the statute law of New York, though the transaction giving rise to the instrument be stated therein the order would be none the less unconditional.

This rule of the Negotiable Instruments Act obtained at the Law Merchant as is well illustrated by the cases of *Preston* v. *Whitney,* 23 Mich. 260; *Siegel* v. *Chicago Trust & Savings Bank,* 131 Ill. 569; *Wells* v. *Brigham,* 6 Cush. (Mass.) 6; *Hereth* v. *Meyer,* 33 Ind. 511. In the *Siegel* case, supra, the action was on a note which recited, "On July 1, 1887, we promise to pay, etc., for the privilege of one framed advertising sign, etc." It was contended that this recital made the promise of payment conditional on the performance of an executory contract by the promisee. But the court held that the mere statement of the consideration or transaction in the instrument did not make the instrument conditional thereon, and that a bona fide holder is not affected by any failure of consideration as between the original parties.

The instant case is then decisive of this question of how far a bona fide holder is affected by the forgery of bills of lading attached to the drafts paid to him by the drawee, and if its decision were otherwise than it is, it would, as is observed by the author of the note to *Finch* v. *Gregg,* in 50 L. R. A. 679, "cause a revolution in commercial circles." J. S. K.

STERILIZATION OF CRIMINALS OR DEFECTIVES.—During the past few years there have been enacted many statutes, the express purpose of which has been the betterment of society. Among this class of statutes are those in California (Stat. 1909, p. 1093, c. 720), Connecticut (Pub. Laws 1909, c. 209), Indiana (Laws 1907, c. 215), Iowa (Laws 1911, c. 129), Michigan (Pub. Acts 1913, No. 34), New Jersey (Pub. Laws 1911, p. 353, c. 190), New York (c. 445, N. Y. Laws 1911), and Washington (See 2287, Rem. and Bal. Code), providing for the sterilization of criminals and defectives. With respect to such legislation the most important question is that of constitutionality. Although in but two of the above states, has the constitutional question been raised, it is nevertheless fitting to comment on such legislation in view of the fact that the only decisions we have upon the subject are seemingly in conflict.

The most recent case upon the subject is *Smith* v. *Board of Examiners of Feeble-minded,* 88 Atl. 96 (N. J.). The prosecutrix, since 1902, had been an

inmate of the State Village of Epileptics, but for the five years last past she had had no attack of the disease. Nevertheless, the Board of Examiners, acting in accordance with c. 190, p. 353 of the laws of 1911, had found that procreation by the prosecutrix was inadvisable and therefore ordered that the operation of salpingectomy be performed as the most effective means to prevent procreation. The act under which this order was made was held unconstitutional on the ground that the prosecutrix was denied the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States. By express provision the whole statute was not rendered unconstitutional because held so as to one class.

Although the New Jersey court expressly limits its opinion to the very case before it, one cannot but read into the opinion a strong feeling of protest against any regulation of society by means of surgical operations. And then too the fact that the statute does not follow the very classification which it makes is given as the sole basis of this opinion. The particular vice of the statute is that a principle of selection is adopted which has no reasonable relation to the purpose of the act. The reasoning of the court is that the purpose of the act was the betterment of society, that all defectives are within that purpose, but by a subclassification the act becomes applicable to but a very small percentage of those within its purpose and is therefore unconstitutional by reason of denying to that small class the equal protection of the laws. And it is also said that there is no basis for such a classification as those who are within a public institution which is properly managed are so situated as to need no further regulation to better society.

For a time it was thought that *State* v. *Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, 11 MICH. L. REV. 150, had determined that the so-called sterilization and asexualization statutes were constitutional. But since the New Jersey decision the opinion that the effect of the Washington decision had been destroyed has gained ground. In fact the opponents of such legislation have expressed the opinion that the New Jersey decision has completely destroyed the effect of the Washington decision and also are of the opinion that the states to be heard from on the question will follow the New Jersey court. But a close examination of these two cases will show such a number of distinguishing features that it will appear doubtful whether or not the Washington decision has been shaken even in the slightest degree.

The Washington case is one in which the objection was made that the punishment was cruel and unusual. The defendant had been sentenced to a term in prison for the crime of statutory rape, committed upon the person of a female child under the age of ten years, and in addition to this punishment the court ordered that the operation of vasectomy be performed. This operation is a simple operation and involves no serious consequences, and so the court decided that the punishment was not cruel and unusual. (The question at once presents itself as to whether a punishment is to be considered as not cruel and unusual, merely because it may be inflicted without pain.) This case decides nothing as to defectives nor as to females, although there are provisions in the statute which cover such cases. Close reading of this decision shows that the court limited its opinion to the very case before it and

gave no intimation of its opinion as to any situation other than that before it. The reasoning of the New Jersey court as to there being no reason for performing an operation upon one within a state institution is not entitled to any weight in considering a case like *Feilen* v. *State,* as the criminal, after serving his sentence, is allowed to go forth into the world while the defective is not. And the objection that such legislation does not apply to all of a class within the purpose of the statute is not tenable in a case involving a criminal of a certain type as all of that class are reached with but few exceptions.

Now *Smith* v. *Board of Examiners* is a case of the most extreme type. The person involved is one who is never to be allowed to go forth in the world, but is always to be confined in a well managed state institution. The argument that society is amply protected by confinement alone cannot be answered. That the purpose of the statute is fulfilled by the confinement without the necessity of an operation admits of no argument and the correctness of this reasoning cannot be assailed. Then too the operation ordered in this case is not a simple office operation but is denominated a heavy operation, one likely to result in the death of the patient. The facts of these cases being so different it is very difficult indeed to see any conflict. It is very interesting to note that *Smith* v. *Board of Examiners* is direct authority for the unconstitutionality of the act passed by the recent legislature in Michigan (Pub. Acts 1913, No. 34), the statutes being alike except that of New Jersey contains a provision applicable to criminals.

There is no doubt that some of the legislation for the betterment of society has been unreasonable and ill-advised, and for these reasons has created a storm of protest. It seems as if in this field there has been an attempt to accomplish too much at one time. The objections to such legislation may be summed up as follows: the facts upon which it is based are debatable; the remedy is of doubtful utility; and such legislation is unwise on constitutional grounds.

All such legislation is based upon the theory that heredity plays a most important part in the transmission of crime, idiocy and imbecility. In spite of the great amount of statistics gathered upon the subject, there is no convincing evidence that criminality is transmissible. This is apparent from the investigation of Dr. Edith R. SPAULDING, Resident Physician at the Reformatory for Women, South Framingham, Mass., and Dr. William HEALY, Director of the Psychopathic Institute, Chicago. The direct result of this intensive research, so conducted that development and environmental conditions were eliminated, is that it is yet to be proven that there is a direct inheritance of criminality per se. So the authority for the sterilization of criminals cannot come from the police power of the state but must be derived from the criminal law. As to idiocy and imbecility there are many scientists, worthy of the greatest respect, who express the opinion that these mental conditions are not transmissible and that the same are due to environment. In view of this state of affairs does it seem as if our legislatures are sufficiently informed and advised upon the subject of heredity to undertake the enactment of laws based upon that theory?

The reasoning of *Smith* v. *Board of Examiners* shows conclusively that as

to defectives nothing is accomplished by subjecting those who are confined to a state institution to such an operation. Even as applied to criminals (transmissibility of criminality being conceded), the beneficial result would be negligible. This fact is pointedly illustrated by Mr. Charles A. BOSTON in an excellent article, "A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles," 4 JOUR. CRIM. LAW AND CRIMINOLOGY 326.

If it be admitted that such legislation is constitutional what is to prevent the legislature from enacting that other classes be sterilized in order to prevent the transmission of mental conditions possessed by those classes and deemed undesirable for the public good? Then too is such legislation in keeping with the spirit of the Bill of Rights found in our Constitutions. In view of the crude form of many of the statutes, using terms as yet undefined to classify persons, and providing little or no protection for the unfortunates selected as subjects, would it not be better for our law-making bodies to proceed more cautiously and conservatively in this field of legislation?

G. E. K.

THE EFFECT OF A MINIMUM WAGE ORDINANCE UPON SPECIAL ASSESSMENTS.—May a city, in making improvements and levying special assessments to pay therefor, pass a minimum wage ordinance whose effect is to charge the property owners twenty-five per cent more for labor performed than they would have had to pay had they contracted for the same work in their own behalf? The practical importance of this question is evidenced by a very recent Washington case, *Malette* v. *City of Spokane* (1914), 137 Pac. 496. The facts were these: The city of Spokane passed an ordinance prescribing a minimum rate of $2.75 for a day's common labor of eight hours on all city work. This rate was about twenty-five per cent higher than the current rate paid for similar labor by private persons. Later, the city provided for the improvement of a certain street along which appellant owned property, which improvement was to be paid for by special assessments against the property benefited. Appellant contended that since the cost of the work was not to be borne by the city, but by the property owners, the city, in respect of this improvement, acted merely as agent of the property owner, and was bound to do his work to the best advantage; that such work could not be done to the best advantage under the minimum wage ordinance, which empirically fixed a wage and compelled its payment by an independent contractor, thereby increasing the cost of the work; that the same violated the trust relation between agent and principal and was therefore void. *Held,* by a divided court, that the ordinance was valid.

In reaching its decision, which a dissenting judge denominated "judicial legislation, which is judicial tyranny," the court completely departed from the position it took when the case had its first hearing more than a year ago. 68 Wash. 578, 123 Pac. 1005. The theory of the court at that time was this: that the city in improving a street at the cost of the benefited property owners acts not in a governmental, but in a proprietary capacity and as the agent of the owner. Two difficulties connect themselves with such a theory. First,